No. 89-1782

In The

Supreme Court of the United States

October Term, 1989

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS, STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND CIRCLE VILLAGE,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For the Ninth Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Did the States give up their sovereign immunity when sued by an Indian tribe in federal court by consenting upon entry into the Union to be bound by the Commerce Clause of the United States Constitution?

2. Is an Indian group automatically a tribe for the purposes of 28 U.S.C. § 1362 (federal jurisdiction over suits by Indian tribes) because it can organize under the Alaska Native Reorganization Act or because it is identified as a "Native village" in the Alaska Native Claims Settlement Act?[1]

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[1] As to the third question listed in the petition for a writ of certiorari, see page 6, n.8, *infra*.

LIST OF PARTIES

Petitioner:

David Hoffman, Commissioner, Department of Community and Regional Affairs, State of Alaska

Respondents:

Native Village of Noatak

Circle Village

Plaintiff in the proceedings in the United States District Court only:

Native Village of Akiachak

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 896 F.2d 1157 (Pet. App. B-3). The October 28, 1987, Order of the United States District Court for the District of Alaska, filed December 1, 1987, is unpublished (Pet. App. A-5).

JURISDICTION

On March 30, 1989, the Court of Appeals for the Ninth Circuit issued an opinion reversing the decision of the United States District Court for the District of Alaska. *Native Village of Noatak v. Hoffman*, 872 F.2d 1384 (9th Cir. 1989) (*Noatak I*). The State of Alaska filed a petition for rehearing and suggestion for rehearing en banc. On February 12, 1990, the Ninth Circuit withdrew its March 30, 1989, opinion, denied the petition for rehearing, rejected the suggestion for rehearing en banc, and issued an amended opinion. *Native Village of Noatak v. Hoffman*, 896 F.2d 1157 (9th Cir. 1990) (*Noatak II*). The petition for a writ of certiorari was filed on May 14, 1990 and was granted on October 1, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

In 1980, the Alaska legislature enacted AS 29.89.050.[2] The statute created a State revenue sharing program for

[2] AS 29.89.050 provided:

> The state shall pay $25,000 to a Native village government for a village which is not incorporated as a city under this title. In this section, "Native village government" means
>
> (1) a local governing body organized by authority of the Act of Congress of June 18, 1934 (25 U.S.C. sec. 476); or
>
> (2) a traditional village council or, if there is no traditional village council, the paramount chief or

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unincorporated communities with Native village governments. The program was first implemented in fiscal year 1981.[3] On advice of the Alaska Attorney General that the revenue sharing program violated several provisions of the Alaska Constitution,[4] the commissioner expanded the program to include all unincorporated communities and made subsequent appropriation requests to the Alaska legislature for the expanded class of recipients. J.A. 43.[5]

During the time the program was implemented as expanded, the legislature appropriated about the same amount of money per year for each eligible community as

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> other governing body of a Native village which meets the requirements of the Alaska Native Claims Settlement Act (43 U.S.C. sec. 1601-1628). (§ 3, ch. 155, SLA 1980).

[3] Fiscal years for the State of Alaska run from July 1 – June 30.

[4] It was the opinion of the Attorney General that the statute violated the equal protection and public purpose provisions of the Alaska Constitution because (1) similarly situated unincorporated communities without Native village governments were excluded from the program, and (2) it could not be guaranteed that the money provided under the program would be used for the good of the whole community. *See* Exhibits A-1, A-2, and A-3 to the Affidavit of Marty Rutherford. J.A. 49-65.

[5] The Commissioner delayed the expansion until fiscal year 1983 in order to give the Alaska legislature the opportunity to appropriate funds for the expanded class of recipients. The legislature did just that. The expanded program continued through fiscal year 1985, when the Alaska legislature repealed AS 29.89.050 and replaced it with AS 29.60.140, which continues that administratively expanded program. J.A. 43-44.

before the expansion. J.A. 44-46. The legislature never appropriated the full amount authorized under the statute – $25,000 – either before or after the expansion of the program. J.A. 45-46. The Native Village of Noatak and Circle Village, among others, received funds under the program, both as enacted, and as expanded. J.A. 43-48.[6]

In calendar year 1985, the legislature repealed AS 29.89.050 and enacted a revenue sharing program for unincorporated communities that is nearly identical to the program as expanded by the commissioner on the advice of the Attorney General. J.A. 44. On September 3, 1985, the Native Village of Noatak, Circle Village, and the Native Council of Akiachak filed suit in the United States District Court for the District of Alaska against the Commissioner of the Department of Community and Regional Affairs for the State of Alaska. In the complaint, they challenged (1) the opinions of the Alaska Attorney General that AS 29.89.050, which provided revenue sharing only to unincorporated communities with a "Native village government", violated the Alaska Constitution, and (2) the subsequent expansion and administration of that revenue sharing program in conformity with the opinions. The plaintiffs sought both injunctive and monetary relief. J.A. 3-20.

The Native Village of Noatak is an unincorporated community that has a Native council organized under the

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[6] All monies appropriated for the program have been disbursed except for $611.00, the amount to which the Native Village of Noatak would be entitled if it prevailed on the merits of this lawsuit. J.A. 47.

Alaska Native Reorganization Act, 25 U.S.C. § 473a. Circle Village is an unincorporated community founded in 1887 as a supply town for gold rush miners. Circle has both a Native council (the respondent), founded in 1970, and a multi-racial civic association. Both villages have populations made up of both Natives and non-Natives. Neither village occupies a reservation. CR 21, Ex. A-6; Pet. 3, n.2.

The District Court dismissed the complaint on the basis that the State of Alaska was immune from suit under the Eleventh Amendment, or alternatively, because no federal question was raised in the complaint. Pet. App A-1-14. The Native Village of Noatak and Circle Village (the Villages) appealed. J.A. 1. In March 1989, the Court of Appeals for the Ninth Circuit reversed the ruling of the District Court. *Noatak I*, 872 F.2d 1384. It held that the Villages are Indian tribes "duly recognized by the Secretary of the Interior" and that in this case 28 U.S.C. § 1362 overrode Alaska's sovereign immunity from suit in federal court without its consent. In February 1990, the Court of Appeals, while denying Alaska's petition for rehearing, withdrew its earlier opinion and substituted a revised opinion that likewise reversed the District Court ruling, albeit on different grounds. *Noatak II*, 896 F.2d 1157.

In *Noatak II*, the Ninth Circuit again ruled that the Villages are tribes for purposes of asserting jurisdiction under 28 U.S.C. § 1362. Unlike in its earlier decision, however, the Ninth Circuit then ruled that 28 U.S.C. § 1362 "did not strip the states of their immunity", Pet. App. B-12, because it did not abrogate that immunity unequivocally and textually. *Dellmuth v. Muth*, 109 S.Ct.

2397, 2401 (1989). Instead, the Ninth Circuit concluded that the States' consent to suit by Indian tribes in federal court was "inherent in the constitutional plan". Pet. App. B-18. Finally, the Ninth Circuit held that a federal question had been sufficiently alleged to warrant the exercise of federal jurisdiction. Pet. App. B-20-22. Judge Kozinski dissented from the latter determination on the ground that the Villages claims were "insubstantial" and "frivolous".[7] Pet. App. B-25-26.

On October 1, 1990, this Court granted a writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit.[8]

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[7] The Court of Appeals concluded that when the Commissioner expanded the revenue sharing program, he did so after taking the race of the recipients into account, and that the process of considering race was itself a violation of the Fourteenth Amendment. The State's contention is that taking race into account in order to eliminate unequal benefits cannot violate federal law and so raises no federal question. *See* Crawford v. Board of Education of the City of Los Angeles, 458 U.S. 527, 538 (1982).

[8] In our petition for a writ of certiorari, the State of Alaska argued alternatively that the Court of Appeals erred in concluding that federal question jurisdiction existed in this case. Although the State still believes the decision below to have been in error, upon further reflection we conclude that this issue does not merit plenary consideration and therefore do not address it here.

SUMMARY OF ARGUMENT

1. In this case, the Court of Appeals for the Ninth Circuit decided that no State has immunity from suit, including under the Eleventh Amendment, when brought by an Indian tribe in federal court because upon admission to the union each State waived its immunity by acceptance of the plenary authority of Congress "to regulate commerce with the Indian tribes." U.S. Const. Art. I, Sec. 8, cl. 3. The Ninth Circuit decision is contrary to this Court's decisions in *United States v. Minnesota*, 270 U.S. 183, 193-95 (1926) and *Arizona v. California*, 460 U.S. 605, 614 (1983). In addition, this Court has already rejected the argument that implied waivers of immunity can be found in the commerce clause. *Welch v. Texas Dep't of Highways and Public Transp.*, 483 U.S. 468, 489 (1987). Finally, history does not support the Ninth Circuit's decision.

At the time of the drafting and ratification of the United States Constitution, Indian tribes were not even able to bring suit in the federal courts. *Cherokee Nation v. State of Georgia*, 30 U.S. (5 Pet.) 1 (1831). Therefore, an implied consent to suit (or an implied waiver of sovereign immunity) by consenting to the plan of the Convention is neither logical nor supportable.

While Congress in the exercise of its authority under the commerce clause may abrogate a State's immunity by the enactment of legislation, *Welch, supra* and its progeny, the legislation must do so "unequivocally and textually". *Dellmuth v. Muth*, 109 S.Ct 2397, 2401 (1989). Even the Ninth Circuit agrees that 28 U.S.C. § 1362 does not meet that standard. *Noatak II*, 896 F.2d at 1162. The Ninth Circuit's decision on the issue of sovereign immunity at

least partly undoes the balance of federalism that was struck in 1789 between the States and the United States; that decision should be reversed.

2. The State of Alaska believes that the Native Village of Noatak is a tribe. The State of Alaska believes that Circle Village is not a tribe. Irrespective of those beliefs, the Ninth Circuit's decision about tribal status in Alaska is a dramatic departure from existing law on recognition of tribal status. The dramatic departure is unjustified.

The Ninth Circuit decided that for purposes of 28 U.S.C. § 1362, the Native Village of Noatak is a tribe simply because it has organized under the Alaska Native Reorganization Act, 25 U.S.C. § 473a, and that for purposes of 28 U.S.C. § 1362, the Native Village of Noatak and Circle Village are tribes because they are listed as Native villages in the Alaska Native Claims Settlement Act, (ANCSA) 43 U.S.C. §§ 1601 et seq.[9] Yet under the Alaska Native Reorganization Act, it is clear that

[9] Some Native villages have argued that the Court of Appeals' decision means recognition of tribal status generally. *See* Chilkat Indian Village v. Johnson, *et al.*, No. J84-024 (U.S.D.C. Alaska); Alyeska Pipeline Serv. Co. v. Native Village of Copper Center, No. A87-201 (U.S.D.C. Alaska); State of Alaska v. Native Village of Venetie, No. F87-0051 (U.S.D.C. Alaska). If this view were accurate, it could lead to a substantial proliferation of new tribes in Alaska, thus posing a potentially significant impact in the State of Alaska. However, a later ruling by a different panel of the Ninth Circuit may have narrowed the use of the methodology to tribal status for purposes of 28 U.S.C. § 1362 alone. *See* Native Village of Venetie v. State of Alaska, ___ F.2d ___, No. 88-3929 (9th Cir. Nov. 6, 1990), slip op. at 13589.

non-tribal organizations with only "a common bond of occupation, or association, or residence . . . " may be organized. 25 U.S.C. § 473a. And in ANCSA, Native villages include such diverse entities as "any tribe, band, clan, group, village, community, or association in Alaska". 43 U.S.C. § 1602(c). The State of Alaska would agree that some groups organized under the Alaska Native Reorganization Act are tribes and some listed in the Alaska Native Claims Settlement Act are tribes. However, automatic recognition as tribes on the basis of organization under one or identification in the other, without any factual examination of their history and current status, is not justified. The Ninth Circuit's decision on this issue should also be reversed.

ARGUMENT

I. THE SOVEREIGN IMMUNITY OF THE STATES BARS A SUIT BY AN INDIAN TRIBE IN THE FEDERAL COURTS.

This Court has often considered the extent of the sovereign immunity of the States and the Eleventh Amendment that preserves it. The amendment precludes a federal court from adjudicating claims against a State, including those asserted by its own citizens. *See Edelman v. Jordan*, 415 U.S. 651 (1974); *Hans v. Louisiana*, 134 U.S. 1 (1890). However, the doctrine is subject to a number of exceptions that, under limited circumstances, allow the federal courts to adjudicate claims against States.[10]

[10] For example, (1) a suit against a State by the United States, U.S. Constitution, Art. III, § 2, (2) a suit against a State

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This suit, which is against the State of Alaska and one of its commissioners in his official capacity, seeks money damages but no prospective relief.[11] Two distinct arguments have been advanced in support of the proposition that Indian tribes may sue a state in the federal courts.[12] The Court of Appeals for the Ninth Circuit held that each State waived its immunity from suit by an Indian tribe when that State agreed to the plan of the Union. *Noatak II*, 896 F.2d at 1161-65. In addition, the respondents argued below that 28 U.S.C. § 1362 was a Congressional abrogation of the States' sovereign immunity for suits by Indian tribes.[13] Neither theory is sound.

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official in his or her official capacity brought to halt the enforcement of a State law which violates the federal constitution, Ex Parte Young, 209 U.S. 123 (1908), (3) a suit against a State that has waived its immunity, Clark v. Barnard, 108 U.S. 436 (1883); United States v. Texas, 143 U.S. 621 (1891), and (4) a suit against a State after Congress has specifically and expressly abrogated the immunity, e.g. Dellmuth v. Muth, 109 S.Ct 2397 (1989).

[11] The statute at issue here was repealed in 1985 and replaced that same year by a statute giving revenue sharing to all unincorporated communities. *See* pages 3-4, *supra*.

[12] Although the State of Alaska does not believe that Circle Village could qualify for tribal status under existing law, for purposes of this argument we will assume that both of the respondents are Indian tribes.

[13] The Ninth Circuit adopted this rationale in *Noatak I* but upon reconsideration agreed that § 1362 was not intended to abrogate State sovereign immunity. *Noatak II*, 896 F.2d at 1162. The State of Alaska expects the respondents to make that argument again in this Court.

A. The States did not waive their sovereign immunity when they agreed to the constitutional plan of Union.

1. *The Intent of the Framers*. The immediate problem with the Ninth Circuit's theory of the States' implied consent to suits by Indian tribes upon entering the Union is that neither the Founding Fathers at the Convention in 1787 nor the members of Congress who in 1793 passed or the States that in 1795 ratified the Eleventh Amendment believed that Indian tribes could sue in federal courts at all. There was virtually no discussion of Indian issues at the Convention of 1787, and the original Constitution mentions Indians only twice, first to exclude most of them ("Indians not taxed") from the body politic (Art. I, § 2, cl. 3), and later to confer on Congress the power to "regulate commerce . . . with the Indian tribes" (Art. I, § 8, cl. 3).[14] Indians are not mentioned at all in Article III, the article establishing the authority of the federal judiciary. Certainly, there is nothing to indicate any consciousness by the delegates that they were creating a waiver of a substantial State sovereign right. Finally, there is no discussion in the Federalist Papers even remotely indicating that the constitutional plan required that Indian tribes be able to sue the States without their consent.[15]

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[14] *See, generally*, Claiborne, "Black Men, Red Men, and the Constitution of 1787: A Bicentennial Apology by a Middle Templar", 15 Hastings Const. L. Rev. 269, 281-91 (1988).

[15] By way of contrast, however, there is considerably historical evidence, both in the Federalist Papers and in the debates concerning the adoption of the Constitution, that under the new Constitution States were not amenable to suit in

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The power of Congress to regulate commerce with the Indian tribes does indicate a conscious concession by the States of one prerogative to the federal government, i.e., plenary power to legislate over Indian affairs. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). However, it does not even remotely suggest a waiver of the States' sovereign immunity. If it did, the federal monopoly on foreign affairs (created in part by the same Commerce Clause) presumably would also imply that foreign nations can sue States as well. This, of course, is not the law.[16]

Even less can be made of the clause that excludes "Indians not taxed" from State populations determined for purposes of apportioning representation in Congress. This provision could conceivably suggest a view of tribal Indians as distinct political communities, which in turn might support some degree of tribal sovereignty;[17] however, the conclusion that a State's sovereign immunity was somehow surrendered simply does not follow from that premise. The status of foreign nations is again illustrative of that point. Even the most extreme proponent of

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federal court without consent. *See* Federalist No. 81, pp. 548-49 (J. Cooke ed. 1961) and 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 533, 555-56 (2d ed. 1961). *See also* Welch v. Dep't of Highways and Public Transp., 483 U.S. 468, 480, n.10 (1987); Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238, n.2 (1985).

[16] Monaco v. Mississippi, 292 U.S. 313 (1934). *Cf.* Welch v. Texas Dep't of Highways and Public Transp., 483 U.S. 468, 489 (1987).

[17] *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

Indian sovereignty would not claim greater independence than that of foreign nations; yet foreign nations may not file an unconsented to suit against a State.

Chief Justice Marshall clearly explained the situation in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831):

> At the time the Constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the Constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the Union.

Justice Marshall concluded that " . . . the Framers of our Constitution had not the Indian tribes in view when they opened the courts of the union to controversies between a State, or the citizens thereof, and foreign States." 30 U.S. at 18.

In sum, history suggests that, far from removing State immunity in federal courts, the Founders never believed that the tribes had access to the courts in the first place.

The same is true for the members of Congress and the States which enacted and ratified the Eleventh Amendment. The amendment was passed with "vehement speed"[18] to reverse the decision of the Supreme

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[18] Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 708 (1949) (Justice Frankfurter dissenting).

Court in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), permitting a suit against a State by a citizen of another State. This Court has consistently interpreted the enactment of the Eleventh Amendment as an affirmation of each State's sovereign immunity, including to suit by its own citizens.[19] Again, there is no historical support for

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[19] *See, e.g.*, Hans v. Louisiana, 134 U.S. 1 (1890). In *Hans*, this Court noted that the principles of federalism inherent in the original plan of the Constitution surely could not have contemplated suits and actions that were then unknown to the law:

> The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. And yet the case of *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those Articles. 131 U.S. App. 1. The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this court has often declined to take jurisdiction. *See Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 288, 289 [32: 239, 242, 243], and cases there cited.

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compulsory arbitration; Congress has also established a statutory scheme for such claims that is inconsistent with compulsory arbitration.

In enacting Title VII and the ADEA, Congress created a detailed and unique statutory scheme clearly aimed at eliminating discrimination in employment. *Alexander*, 415 U.S. at 44, 39 L. Ed. 2d at 155-56 (Title VII). The Equal Employment Opportunity Commission ("EEOC") was created with the authority to investigate and attempt to conciliate charges of discrimination. The EEOC is authorized to institute civil actions against employers or unions. No action can be maintained under either Title VII or the ADEA unless a timely charge is filed with the EEOC. Compulsory arbitration of Title VII and ADEA claims would conflict with this statutory scheme and undermine the role of the EEOC, the agency Congress created to handle these claims.

In addition, arbitration provides an inappropriate forum for employment discrimination claims, in part because of the way arbitration works, especially arbitration under the NYSE rules.[3] Panels under the Rules are generally made up of a majority of "public arbitrators"

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[3] Since Gilmer brought this action, the NYSE has amended its rules. The amendments are reported at 54 Fed. Reg. 21144. Presumably the new rules would apply if Gilmer were to arbitrate his claim; therefore, this discussion will focus on the new rules. The changes with respect to disclosure of arbitration clauses would not apply to Gilmer, because he executed his agreement under the old rules. As will be demonstrated *infra*, the disclosure to Gilmer fell woefully short of the requirements under the new rules.

with certain ambiguous qualifications omitted from the constitutional provision." Abel, *supra*, at 467.[20] By contrast, the grant of power to Congress to regulate interstate and foreign commerce represented a dramatic increase in the powers that the national government enjoyed under the Articles of Confederation and was understandably the focus of considerable debate. Abel, *supra, passim*. In light of the fact that the power to regulate Indian affairs had already been conferred upon the national government under the Articles of Confederation, when there was no question of the amenability of a State to suit in federal court by Indians, or by anyone else, it is difficult to contend that the mere reaffirmation of that power in the Constitution – to which the Framers gave scant attention – turned out to be a waiver of the States' sovereign immunity. Against that background it would be truly remarkable to discover that when they ratified the Constitution the States were consenting to be sued by tribes in the federal courts.

2. *Judicial interpretation of State Immunity*. As noted above, the Supreme Court, through Chief Justice Marshall, declared unequivocally in 1831 that the Framers did not consider the federal courts to be open to suit by Indian tribes. Although the rights of Indian tribes and individual Indians have steadily increased since that

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[20] The Articles of Confederation provided that "[t]he United States, in Congress assembled, shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians not members of any of the states; provided that the legislative right of any State within its own limits be not infringed or violated". Articles of Confederation, art. 9, para. 4.

time, the Court has never departed from its ruling that the Constitution did not remove the States' immunity from suit by Indian tribes.

The proposition that suits by tribes against States is inherent in the constitutional plan is directly contradicted by the unambiguous statement of this Court in *United States v. Minnesota*, 270 U.S. 181, 194-95 (1926). There the Court dealt with the argument that the State's immunity from suit by a tribe foreclosed a like suit by the United States as their guardian. In rejecting that conclusion, the Court expressly endorsed the premise that "the Indians could not bring the suits . . . " 270 U.S. at 195. Given the basis of the claim (treaties and statutes running in favor of the tribe) and the remedy sought (a money judgment, the proceeds to be held in trust for the tribe), the reference to "the Indians" must be read as referring to the tribe, not the individuals. We thus have a clear declaration of the proposition – treated as beyond debate – that, absent consent or Congressional waiver, a State is immune from s by an Indian tribe.[21] *Accord, Arizona v. California*, 460 U.S. 605, 614 (1983).

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[21] There is additional support for the finding that there was no historical understanding of an implied Constitutional consent to suits by tribes against States in the fact that the federal courts were generally not open at all to Indians before 1924. 13B Wright & Miller, *Federal Practice and Procedure*, § 3622, p. 583 (2d ed. 1984). Before Indian citizenship was granted in 1924. Indians and tribes were able to sue in federal courts only by virtue of special jurisdictional statutes or by naturalization conferred by treaty or by Congress. *See e.g.* Felix v. Patrick, 145 U.S. 317, 330, 332 (1892).

prove. The NYSE Rules have no provision equivalent to Rule 26(b)(1) of the Federal Rules of Civil Procedure, which allows a party to discover "any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." The rules providing that depositions may be taken only at the discretion of the arbitrator, and the Rules' lack of provision for sanctions or other penalties for failure to comply with discovery requests, put an employment discrimination plaintiff at a severe disadvantage.

Another important difference between arbitration under the NYSE Rules and a judicial proceeding is that arbitration does not require the issuance of a written opinion. *See id.* at 21151. Of course, in a bench trial, the judge must set forth the relevant facts and the law as applied to the facts.

The absence of written arbitrators' opinions creates severe problems for age discrimination claimants. It makes appeal extremely difficult because the employee is unable to determine the grounds for the award. It is impossible to determine which facts the arbitrator considered determinative, which law the arbitrator applied, how the arbitrator applied the law, or even whether the arbitrator applied the law. In addition, the lack of a written opinion can hide a compromise award. Although this may be appropriate in routine contractual disputes, it is singularly inappropriate in employment discrimination cases, considering Congress' strong policy against discrimination in the workplace. *See, e.g.*, 29 U.S.C. § 621(b).

constitutional right, a distinction that was overlooked in *Parden*.[22] The Court emphatically held that the mere fact of agreeing to the Commerce Clause did not amount to a waiver of State sovereign immunity, and that for Congress to abrogate that immunity required a clear textual declaration of that intent. Just as with the Commerce Clause as applied "among the several States", the same Clause as applied to commerce "with the Indian Tribes" contains nothing identifiable as consent, or as intending that State sovereign immunity be waived.[23]

The Ninth Circuit decision put great emphasis on analogizing Indian tribes to States, the theory being that since tribes were present as "units of government" when

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[22] *Welch* held that, assuming Congress has the power to abrogate the States' Eleventh Amendment immunity, it must do so in unmistakably clear language. 483 U.S. at 478. Since then, any argument based on a claim of the States' consent to the Commerce Clause must be understood, not as an argument purporting to establish a *waiver* of Eleventh Amendment sovereign immunity, but rather as purporting to establish consent to the proposition that Congress has the authority to abrogate Eleventh Amendment immunity.

[23] A useful way to examine the question is to use the formula suggested in Hans v. Louisiana, 134 U.S. 1 (1890): Can one suppose that when the Eleventh Amendment was adopted, it was understood that Indian tribes were to be allowed to sue States in federal court, "whilst the idea of suits by citizens of other states or foreign states was indignantly repelled?" Likewise, can one suppose that the members of Congress who proposed the Amendment would have been willing to add to it a proviso that it did not apply to suits against States by tribes? As the Court stated in *Hans*, the supposition that Congress would have "is almost an absurdity on its face." Hans v. Louisiana, 134 U.S. at 14.

the Union was formed, the framework of the Constitution must imply the same right of access to federal courts against States as that of the States themselves. Apart from the contrary historical evidence of the Framers' intentions, the analogy of tribes to States runs counter to this Court's own recent analysis. For example, in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), this Court rejected the theory that the Commerce Clause requires that a tribe be treated as a State for purposes of determining how State taxes and tribal taxes on reservation activity should be apportioned. The central purpose of the Commerce Clause's reference to Indian tribes, it held, was to provide Congress with plenary power in the field of Indian affairs, and is not justification for extending the unique place of the States in the constitutional system to tribes.

An appropriate analogy comes by comparing suits by Indian tribes against States with suits by foreign states against States. The unassailable conclusion is that State sovereign immunity applies in both cases. To avoid this result, it is argued that tribes are more like the United States in that they are "domestic" nations. But this makes no constitutional sense. As far as its powers go, the United States is the supreme sovereign, whose laws override those of the States with no territorial limitation. That is the essence of the Supremacy Clause. But no comparable claim can be made for any Indian tribe. Even the limited reach of tribal law is geographically confined and its qualified "supremacy" within reservation boundaries is subject to complete defeasance by the United States.[24]

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[24] *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141, 149 (1982); Escondido Mutual Water Co. v. La Jolla Bands

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In light of this constitutional principle, it is absurd to pretend that the United States and Indian tribes are comparable.[25]

There is no persuasive evidence, historical or otherwise, that the principles of federalism inherent in the plan of the Constitution require that Indian tribes be able to sue a State in federal court without its consent.[26] If it is true that those inherent principles compel the conclusion that a State has consented to such suits, this consent should not be construed as automatic, but rather that

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of Mission Indians, 466 U.S. 765, 788 (1984); Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 198 (1985).

[25] We also note that neither considerations of fairness nor the principles of federalism support the historical argument. Unlike States, Indian tribes generally enjoy sovereign immunity from suits by States. Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165, 172-73 (1977). Equity suggests that at a minimum, immunity be mutual, not the one-way waiver of immunity suggested by the Ninth Circuit. Indeed, if the constitutional plan does imply that the federal courts are open to suits against States by tribes, it may also imply the converse, unless the Indian tribes are somehow more "sovereign" than the States. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 24 (1987) (Justice Stevens concurring in part and dissenting in part); *cf.* Citizen Band Potawatomi Indian Tribe v. Oklahoma Tax Comm'n, 888 F.2d 1303 (10th Cir. 1989), *cert. granted*, ___ U.S. ___ (October 1, 1990).

[26] Such a result is historically and legally unnecessary, since the United States, as trustee for Indian tribes, has always had the authority to initiate litigation against a State on behalf of a tribe. *See* Moe v. Confederated Kootenai and Salish Tribes, 425 U.S. 463, 473 (1976).

Congress has the power to abrogate that immunity. As this Court stated in *Edelman v. Jordan*, 415 U.S. 651 (1974):

> Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."

415 U.S. at 673, citations omitted.

Thus we are back to the rule announced by this Court in *Welch v. Dep't of Highways and Public Transp.* 483 U.S. 468 (1987); *Atascadero State Hospital v. Scanlon*, 437 U.S. 234 (1985), *Dellmuth v. Muth*, 105 L.Ed.2d 181 (1989), and most recently in *Hoffman v. Connecticut Dep't of Income Maintenance*, 106 L.Ed.2d 76 (1989). This rule simply states that since abrogation of sovereign immunity upsets "the fundamental constitutional balance between the federal government and the States," Congress may abrogate a State's immunity from suit only by making its intent to do so unmistakably clear. So the only remaining question is whether Congress ever expressed such an intention when it authorized suits by tribes in 28 U.S.C. § 1362.

C. Congress did not intend 28 U.S.C. § 1362 to abrogate the sovereign immunity of the States.

Congress can abrogate a State's sovereign immunity but must do so expressly and with clear intent. *Dellmuth v. Muth*, 105 L.Ed.2d 181 (1989); *Atascadero State Hospital*

v. Scanlon, 473 U.S. 234, 243 (1985).[27] The decisions of this Court directly and conclusively support the position of the petitioner regarding 28 U.S.C. § 1362.

A careful reading of that statute reveals no such Congressional intent. 28 U.S.C. § 1362 states:

> The district courts shall have original jurisdiction of all civil actions, brought by any

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[27] In *Dellmuth*, Justice Kennedy wrote on behalf of the Court:

> Our opinion in *Atascadero* should have left no doubt that we will conclude Congress intended to abrogate sovereign immunity only if its intention is "unmistakably clear in the language of the statute." *Atascadero, supra* at 242. Lest *Atascadero* be thought to contain any ambiguity, we reaffirm today that in this area of the law, evidence of Congressional intent must be both unequivocal and textual. Respondent's evidence is neither. In particular, we reject the approach of the Court of Appeals, according to which "[w]hile the text of the federal legislation must bear evidence of such an intention, the legislative history may still be used as a resource in determining whether Congress' intention to lift the bar has been made sufficiently manifest." 839 F.2d at 128. Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. If Congress' intention is "unmistakably clear in the language of the statute," recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of *Atascadero* will not be met.

105 L.Ed.2d at 189; *accord Pennsylvania v. Union Gas Co., supra; Will v. Michigan Dep't of State Police*, 105 L.Ed.2d 45 (1989).

> Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Precisely like the Education of the Handicapped Act ruled on by the Supreme Court in *Dellmuth v. Muth, supra*, 28 U.S.C. § 1362 "makes no reference whatsoever to either the Eleventh Amendment or the States' sovereign immunity . . . [n]or does any provision cited. . . . address abrogation in even oblique terms, much else with the clarity *Atascadero* requires." 105 L.Ed.2d at 190. Thus, no abrogation of the States' sovereign immunity can be read into 28 U.S.C. § 1362.

The best parallel to this case is *Welch*, in which this Court considered whether the Jones Act abrogates the Eleventh Amendment so as to permit federal suits against a State by its own citizens. The Jones Act broadly permits suits against employers by *"any* seaman who shall suffer personal injury in the course of his employment" (emphasis added by the Court). The Court ruled that the Eleventh Amendment was not abrogated by the Jones Act, because Congress did not express its intent in unmistakable and unequivocal statutory language. The use by Congress of the phrase *"any* seaman" was insufficient:

> . . . [T]he Eleventh Amendment marks a constitutional distinction between the States and other employers of seamen. Because of the role of the States in our federal system, '[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.'

483 U.S. at 475-76 (citations omitted). The Court explicitly disavowed *Parden v. Terminal Railway*, 377 U.S. 184 (1964), in which an abrogation of the Eleventh Amendment was inferred from language making a statute applicable to "every common carrier by railroad." Instead this Court adopted the position of the dissent in *Parden*:

> It should not be easily inferred that Congress, in legislating pursuant to one article of the Constitution, intended to effect an automatic and compulsory waiver of rights arising under another. Only when Congress has clearly considered the problem and expressly declared that any State which undertakes given regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of this defense.

483 U.S. at 477, citing 377 U.S. at 198-99 (White, J., dissenting). *Accord, Employees v. Missouri Dep't of Public Health and Welfare*, 411 U.S. 279 (1973).

The *Welch* ruling fits this case squarely. Nowhere in 28 U.S.C. § 1362 is there an express unequivocal statement of Congress's intent to abrogate the Eleventh Amendment. The statute mentions neither States nor abrogation. 28 U.S.C. § 1362 is precisely the kind of general authorization to bring suit as is contained in the Jones Act and in the statute at issue in *Parden*. As in those cases, Congress used its constitutional authority to create a judicial remedy, but as this Court held, a general authorization to bring suit cannot by itself be used to abrogate the Eleventh Amendment. The abrogation must be explicit, and since there is no explicit declaration of intent

to abrogate in § 1362, the Eleventh Amendment remains as a bar in this case.[28]

The respondents have previously argued that a passage in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), "authoritatively" construed 28 U.S.C. § 1362 as an abrogation of the States' sovereign immunity. The question before the Court was whether § 1362 exempted Indian tribes from the Anti-Injunction Act, 28 U.S.C. § 1341, which prohibits the district courts from enjoining State taxes. The Court held that because the United States could have maintained the same action as the tribe's trustee, so could the tribe. *Moe*, 425 U.S. at 473. The respondents have argued elsewhere that because the

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[28] If 28 U.S.C. § 1362 were held to be an abrogation of the Eleventh Amendment, it would be unique among federal jurisdictional statutes. Eleventh Amendment immunity is not abrogated by 28 U.S.C. § 1331, 28 U.S.C. § 1343, or 28 U.S.C. § 1353 (Indian allotment claims). Aguilar v. Kleppe, 424 F. Supp. 433 (D. Alaska 1976). The same is true for suits under 28 U.S.C. § 1333 (admiralty jurisdiction). Ex Parte New York, 256 U.S. 490 (1921); Red Star Towing v. Connecticut, 431 F. Supp. 1003 (D. Conn. 1976). The few cases in which the Eleventh Amendment was found not to bar jurisdiction under § 1362 are where there was clear preemption of the State's right to regulate the subject, or are mere dicta, and they all predate *Welch*. *See, e.g.*, Lac Courte Oreilles Band v. Wisconsin, 595 F. Supp. 1077 (W.D. Wisc. 1984) (treaty rights); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) (reservation immunities); Oneida Nation v. New York, 691 F.2d 1070 (2d Cir. 1982). On the other hand, the Eighth Circuit Court of Appeals has confirmed that the Eleventh Amendment is a bar to suits under § 1362, in spite of Indian tribal status. Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135 (8th Cir. 1974).

United States can sue States notwithstanding the Eleventh Amendment, this passage is an authoritative holding by the Court that tribal suits are not barred by States' sovereign immunity. The contention is incorrect and reads entirely too much into a case arising in another context.

Moe had nothing to do with the sovereign immunity of the States. It dealt with a statutory bar to a particular remedy, not with a basic right of sovereign States safeguarded by a Constitutional amendment. Moreover, the Court made it clear that under 28 U.S.C. § 1362, a tribe's right to sue was *not* identical with that of the United States. This Court stated that "the legislative history of § 1362, though by no means dispositive, suggests that *in certain respects* tribes suing under this section were to be accorded treatment *similar* to that of the United States had it sued on their behalf." 425 U.S. at 474. (Emphasis added.) There is no authority for the proposition that an Indian tribe may simply take the place of the United States government whenever the tribe wishes to litigate with a State. Neither *Moe* nor § 1362 offers any support for such a theory.[29]

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[29] The legislative history of 28 U.S.C. § 1362 indicates that it was enacted in order to facilitate tribes' access to the federal courts by eliminating the jurisdictional amount requirement then existing in 28 U.S.C. § 1331. H.R. Report 2040, 89th Cong. 2d Sess., 1966 U.S. Code and Cong. and Ad. News 3145-3149. While it seems that Congress intended to give tribes the ability to sue private parties when the United States is unable or unwilling to do so, there is no indication that Congress intended to permit Indian tribes to bypass the United States's role as trustee when the constitutional rights of States were involved.

The sovereign immunity of the State of Alaska should be held to bar this action.

II. THE COURT OF APPEAL'S NOVEL APPROACH TO TRIBAL STATUS IS CONTRARY TO EXISTING LAW.

The Court of Appeals decided that the respondents were Indian tribes for jurisdictional purposes under 28 U.S.C. § 1362. In so doing, the court used a new method for determining tribal status. When an Indian group is not on the Secretary of the Interior's list of acknowledged tribes, as respondents are not,[30] existing law requires a factual examination using either the criteria in the Federal Acknowledgment Process, 25 CFR Part 83,[31] or

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[30] The Secretary of the Interior maintains a list of recognized tribes in the contiguous 48 States and a separate list of "Native Entities within the State of Alaska Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," 53 Fed. Reg. 52832-52835 (December 29, 1988). The latter list, as explained in its preamble, is an all-inclusive list which goes well beyond historical tribes and includes many organizations, such as State-chartered corporations formed pursuant to the Alaska Native Claims Settlement Act, which have no claim to tribal status and other modern voluntary organizations which do not meet the criteria for tribal status.

[31] 25 C.F.R. Part 83 sets out a test for tribal recognition that examines factors such as continuous historical existence, i.e., exclusion of groups formed in modern times; continuous political authority of the tribe over its members throughout history; inhabiting an area and maintaining an identity distinct from others in the area; and existence of presently functioning political structures. These factors roughly parallel the criteria developed through the case law.

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similar criteria in case law.[32] Neither the Court of Appeals nor the District Court made such a factual examination.

Instead, the Court of Appeals concluded that a group was a tribe if it either (a) is organized under the Alaska Native Reorganization Act, 25 U.S.C. § 473a, or (b) is identified as an Alaska "Native village" in the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 et seq. Neither method is appropriate for determining tribal status.

The State of Alaska believes that the Native Village of Noatak would meet all the criteria in federal law for recognition as a tribe; at the same time, the State of Alaska believes that Circle Village could not so qualify. Our concern is that the use of the Ninth Circuit's methodology for determining tribal status would allow organizations like the Circle Village Council to claim tribal status despite being unable to meet the standards in existing law. There are in Alaska some 200 rural communities, outside of any Indian reservation, with significant

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It is undisputed that the federal government has never recognized the tribal status of any Alaskan Native groups under Part 83.

[32] *See, e.g.*, United States v. Mazurie, 419 U.S. 544 (1975); Price v. State of Hawaii, 764 F.2d 623 (9th Cir. 1985); Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 582 (1st Cir. 1979), *cert. denied*, 444 U.S. 866 (1979). *See also* Native Village of Stevens v. Alaska Management & Planning, 757 P.2d 32 Alaska 1988), in which the Alaska Supreme Court concluded that off-reservation Alaska Native villages cannot qualify as tribes because of their lack of sovereign powers.

Native populations. Some are traditional, predominantly Native communities with active Native councils; others have only a minority of Natives among the population, are not traditional Native communities, and lack active Native councils or other indicia of tribal status. Yet the Native residents of all such communities, no matter what factual variations exist, would achieve automatic tribal status under the Court of Appeals ruling, at least for purposes of 28 U.S.C. § 1362.

A. Organization under the Alaska Native Reorganization Act is not proof of tribal status.

The Court of Appeals concluded that Noatak is a tribe because it has a governing body organized under the Indian Reorganization Act. That act (the "IRA"), at 25 U.S.C. § 476, authorizes tribes to organize and adopt constitutions approved by the Secretary of the Interior. As originally enacted, the IRA applied only to tribes in the lower 48 states; since only tribes could qualify, it was a reasonable conclusion that entities with approved IRA constitutions were in fact tribes.

But the logic fails when applied automatically in Alaska. When Congress extended the provisions of the IRA to cover Alaska Natives in 1936,[33] it explicitly broadened the definition of eligible entities beyond tribes to include

> groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but

[33] Act of May 1, 1936, 49 Stat. 1250, 25 U.S.C. § 473a (the Alaska Native Reorganization Act).

> *having a common bond of occupation, or association, or residence within a well-defined neighborhood, community or rural district,* may organize to adopt constitutions . . . under sections 470, 476, and 477 of this title.

25 U.S.C. § 473a (emphasis added). This provision makes two points clear: Congress did not consider Alaskan Indian groups to have already been accorded tribal status, and Congress intended to extend the benefits of organization under the IRA to groups that were not tribes. Hence groups of Indians who merely lived in the same neighborhood or had a common occupation could organize under the IRA.[34] Congress obviously intended to facilitate the organization of Alaska Natives so that they could secure loans and other economic benefits, despite their lack of tribal status.[35] If Congress had intended that only tribes qualify for IRA constitutions in Alaska, it could have simply added Alaska Natives to the existing eligibility criteria. The broadening language cited above makes sense only if Congress intended non-tribal groups to qualify as well as tribal groups.[36]

[34] In fact, the language as to eligible groups was borrowed by Congress from the Federal Credit Union Act, 12 U.S.C. § 1759, passed a short time earlier, and describing affinity groups eligible to establish credit unions. *See* Cohen, *Handbook of Federal Indian Law* at 414, n. 209.

[35] Congress also permitted organized groups of Alaska Natives to qualify for economic development funding, 25 U.S.C. § 470.

[36] In fact, non-tribal groups did make use of the provision: several fishermen's cooperatives organized under the Alaska Native Reorganization Act, as did groups citing a common

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The fact that the Alaska Native Reorganization Act allows the organization of groups with little more than a voluntary affinity as well as historical tribes is evidence that it was never intended as an alternate method for achieving tribal recognition. Organization under the Alaska Native Reorganization Act varies from existing law on tribal acknowledgment in other ways as well. Under it, an Indian can be a member of several IRA groups simultaneously. However, under the federal rules for tribal acknowledgment, an Indian can be a member of only one tribe. 25 C.F.R. § 83.7. Under the tribal acknowledgment rules, tribes must be historical entities with unbroken histories of activity as a tribal government, 25 CFR 83.7; under the Alaska Native Reorganization Act, modern voluntary organizations can qualify. Hence there can be as many IRA organizations formed as there are affinities under the language cited above, including modern voluntary organizations not successors to any traditional political groups.

According to Cohen, that is precisely what happened in Alaska. Some Native groups organized along geographical lines as political groups, while

> [o]thers, especially in predominantly non-Native communities where municipal activities were already provided, consisted of all the Natives in an area organized solely for business purposes. Still others included persons with a

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bond of residence in an area, and groups which identified themselves as merely "associations" of Alaska Natives. *See* R.M. Farring, "Constitutions and the IRA in Alaska," Educational Services Institute (1985).

> common bond of occupation, such as cooperatives composed of fishermen in an area.

Cohen, *Handbook on Federal Indian Law* at 751. Such groups do not qualify for tribal status under existing case law. *United States v. Mazurie*, 419 U.S. 544 (1975).[37]

In short, tribes may organize under the Alaska Native Reorganization Act, but so may other non-tribal organizations, so the fact of such organization does not itself signify tribal status.[38]

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[37] *See also* Price v. State of Hawaii, 764 F.2d 623 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986); Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 582 (1st Cir. 1979), *cert. denied*, 444 U.S. 866 (1979).

[38] The decision of the Court of Appeals for Ninth Circuit in this case is the second of three recent decisions by separate panels of that court on the test for achieving tribal status by Alaska Native groups. In the first case, another panel of the court rejected the same logic that the panel in this case adopted. In State of Alaska v. Native Village of Venetie, 856 F.2d 1384 (9th Cir. 1988), the court stated:

> Contrary to appellants' contention, this court's decision in *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055, 106 S.Ct. 793, 88 L.Ed.2d 771 (1986), did not hold that organization under the IRA is conclusive evidence of tribal status. In *Price*, the court merely stated that tribal status would be arguable in the event of IRA organization. *Id.* at 626. Also, amici have noted that the language of the IRA's Alaska amendment, 25 U.S.C. § 473a, raises doubt as to whether IRA organization should be construed so conclusively in the case of Alaska Natives. Furthermore, much uncertainty exists concerning the structure of [the Native villages in that case] that may have an impact on the IRA analysis.

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B. Designation as a "Native village" in the Alaska Native Claims Settlement Act is not tantamount to recognition as a tribe.

The Court of Appeals found that both Villages are tribes because they are listed as "Native villages" in the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1610(b)(1). Congress intended ANCSA, 43 U.S.C. § 1601, et seq., as a settlement of the land claims of Alaska Natives.[39] Nowhere in the Act is there any attempt to define the political organizations of Alaska Natives, nor is there even any mention of the concept of tribes. Congress chose not to use existing Native councils, including the respondents, as recipients of the land and money benefits under the Act, but instead established State-chartered corporations for each "Native village."[40]

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856 F.2d at 1387. Finally, in a case decided after certiorari had been granted in this case, a third panel of the Ninth Circuit ruled that Native villages in Alaska may be tribes, but must demonstrate a relationship or connection with an historical political body, particularly one which existed before subjugation by non-Natives. Native Village of Venetie v. State of Alaska, ___ F.2d ___, No. 88-3929 (9th Cir. Nov. 6, 1990), slip. op. at 13600-13601. The court cited the factors in 25 C.F.R. Part 83 for tribal recognition as "mirrors" of the test it offered (slip op. at 13601, n.11). As to the test used by the panel in the instant case for tribal status, the later panel merely noted it as "factors which a court may consider" to determine whether an Indian group may invoke jurisdiction under 28 U.S.C. § 1362 (slip op. at 13589).

[39] 43 U.S.C. § 1601(a).

[40] The villages' ANCSA assets were subject to rules not normally applicable to tribal assets: they were held by

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Indeed, when Congress passed the most recent series of amendments to ANCSA, it explicitly disclaimed any intent to validate claims of sovereign authority by Alaska Native groups (P.L. 100-241, § 17(a), 101 Stat. 1788).

Congress defined "Native villages" in the broadest possible way:

> "Native village" means any tribe, band, clan, group, village, community, or association in Alaska.

43 U.S.C. § 1602(c). Congress clearly intended the category of "Native village" to include Native groups that could not claim tribal status; the concept of tribal status is not even mentioned in the Act. Congress' choice not to designate the Native villages as tribes makes sense in view of the wide variety of fact situations in the Native communities of Alaska because Natives comprise different percentages of the population in their communities, because those communities contain a mixture of traditional and modern settlements, and because there is a wide contrast in the extent to which the Natives in each community have Native political institutions.

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State-chartered corporations subject to State law, not held in trust but freely alienable at the corporation's discretion [43 U.S.C. §§ 1605, 1606, 1607]; were taxable by the State and local governments after an initial period or upon development [§ 1620]; and were not made subject to any tribal powers or authorities. Moreover the Act abolished every reservation in Alaska except the Annette Island Reserve, which chose not to participate in the settlement [§ 1618].

The Court of Appeals erred in using the ANCSA list of "Native villages" as a substitute for the tribal recognition process that applies throughout the rest of the United States. Although most Alaska Native villages probably would qualify as tribes under that process, the ruling below would elevate to tribal status some villages which may well not qualify.[41]

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[41] The Court of appeals also suggested that tribal status could be inferred from the fact that Congress has treated Alaska Native villages as if they were tribes for purposes of certain statutory programs, i.e., the Indian Self-Determination Act, 25 U.S.C. § 450b(e); the Indian Financing Act, 25 U.S.C. § 1452(c); and the Indian Child Welfare Act, 25 U.S.C. § 1903(8). While treatment of Indian groups as tribes by Congress is one factor in determining tribal status, the Court of Appeals ignored the fact that each of the cited statutes is prefaced with the phrase "for the purposes of this chapter."

It also ignored the fact that there are federal statutes in which Congress has explicitly excluded off-reservation Alaska Native villages from programs available to Indian tribes, e.g., the Clean Water Act, 33 U.S.C. §§ 1377(g), (h) and the Resource Conservation and Recovery Act, 42 U.S.C. § 6903(13)(A). *See also* the Indian Tribal Governmental Tax Status Act, 26 U.S.C. § 7701(a)(40)(A), in which Congress identified Alaska Native villages as tribes only if they exercised "substantial governmental" duties. In short, Congress deferred the determination of tribal status pending evaluation of the actual role of particular villages.

Finally, the Court of Appeals overlooked the fact that some of the federal statutes identified as conferring tribal status also designate some Alaska Native organizations, like ANCSA village and regional corporations, as tribes when they undisputedly are not, in order to extend federal benefits or programs to them. *See, e.g.*, the Indian Self-Determination Act and the Indian Financing Act, *supra*.

The ruling also precludes the District Court from doing the detailed fact-finding usually necessary for a finding of tribal status. The case law and 25 C.F.R. Part 83 are completely adequate to enable the courts to make this determination, and, should jurisdiction be found, this case should be remanded to the District Court for that determination. It should not have been automatically made by the Ninth Circuit.

CONCLUSION

For all the reasons argued above the District Court lacked jurisdiction over this case. The decision of the Court of Appeals should be reversed and that of the District Court affirmed.

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APPENDIX

PRINCIPAL CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, clause 3 of the United States Constitution states that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

Article III, Section 2 of the United States Constitution states in relevant part:

> The judicial power shall extend to all cases, in law, and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; – to all cases affecting ambassadors, other public ministers and consuls; – to all cases of admiralty and maritime jurisdiction; – to controversies to which the United States shall be a party; – to controversies between two or more states; – between a state and citizens of another state; – between citizens of different states; – between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

The Eleventh Amendment to the United States Constitution states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Section 3(c) of the Alaska Native Claims Settlement Act (43 U.S.C. § 1602(c)) states:

> "Native village" means any tribe, band, clan, group, village, community, or association in Alaska listed in sections 1610 and 1615 of this title, or which meets the requirements of this chapter, and which the Secretary determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives.

Section 1 of the Alaska amendments to the Indian Reorganization Act (25 U.S.C. § 473a) states:

> Sections 461, 465, 467, 468, 475, 477, and 479 of this title shall after May 1, 1936, apply to the Territory of Alaska: *Provided*, That groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title.

28 U.S.C. § 1362 states:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.